

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

SEATTLE UNIVERSITY

Employer

and

Case 19-RC-122863

**SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 925**

Petitioner

DECISION AND DIRECTION OF ELECTION

The above-captioned matter is before the National Labor Relations Board (the Board) upon a petition duly filed under § 9(c) of the National Labor Relations Act, as amended. A hearing on this petition was held before a hearing officer of the National Labor Relations Board to determine whether it is appropriate to conduct an election in light of the issues raised by the parties. Pursuant to the provisions of § 9(c) of the Act, the Board has delegated its authority in this proceeding to me. Upon the entire record in this proceeding, I make the following findings and conclusions.¹

I. SUMMARY

Seattle University (hereinafter “Employer” or “University”) is an institution of higher learning with its campus in Seattle, Washington, and a small satellite facility in Bellevue, Washington. The Petitioner seeks a unit of all non-tenure-eligible contingent faculty employed by the University except those teaching in nursing and law.² Petitioner stated at the hearing that it

¹ Upon the entire record in this proceeding, I find that:

- a. The hearing officer’s rulings made at the hearing are free from prejudicial error and are hereby affirmed;
- b. The Employer is a non-profit corporation for education purposes with its principal place of business in Seattle, Washington. During the last 12 months, in conducting its operations, the Employer derived gross revenues in excess of \$1,000,000. During that same period, the Employer purchased and received at its Seattle, Washington, location goods valued in excess of \$5,000 directly from points outside of the State of Washington. The Employer is therefore engaged in commerce within the meaning of the Act;
- c. The labor organization involved claims to represent certain employees of the University;
- d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections (2)(6) and (7) of the Act.

² The petition additionally excluded the following: professors emeritus, tenure-eligible faculty, administrative faculty, full-time staff who are not additionally compensated for teaching, administrators, department administrators, campus clergy, deans, associate deans, campus safety personnel, lab assistants, graduate assistants, teaching assistants, managers, guards, and supervisors as defined in the Act. At the hearing, the Petitioner amended its petition to also exclude the following: program coordinators, program directors, directors, clinical professor

was willing to proceed to election in any unit found appropriate by me.

The Employer asserts that:

1. The Board lacks jurisdiction because the Employer is a religiously operated institution that is not subject to the Act according to the principles of *Univ. of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002), *denying enforcement of Univ. of Great Falls*, 331 NLRB 1663 (2000), and *Carroll College v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009), *denying enforcement of Carroll College*, 350 NLRB No. 30 (2007).
2. The full-time faculty in the petitioned-for unit are managers pursuant to *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980).
3. The proposed unit is not appropriate because the employees within it do not share a sufficient community of interest.
4. The proposed unit is not appropriate because it does not include faculty teaching in the College of Nursing and School of Law, as well as clinical faculty.

I have carefully reviewed and considered the record evidence and the arguments of the parties at both the hearing and in their respective post-hearing briefs.³ Based on the entire record in this proceeding and for the reasons set forth below, I find that the University is not a church-operated institution within the meaning of *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). I therefore conclude that the Board may properly assert jurisdiction over the University in this case.

I further find that none of the faculty in the petitioned-for unit is a manager and therefore the proposed unit members are employees under the Act. I also find that the employees within the petitioned-for unit share a community of interest. I find that because the employees the Employer seeks to include do not share an overwhelming community of interest with the petitioned-for unit, none of the additional employees should be included.

II. RECORD EVIDENCE⁴

The University is a private, non-profit co-educational university. It offers undergraduate and graduate degrees at its campus in Seattle, Washington. It is organized into five colleges—Arts and Sciences, Science and Engineering, Education, Nursing, and Matteo Ricci⁵—and three schools—Business and Economics, Law, and Theology and Ministry, which together offer 64 undergraduate programs, 31 graduate programs, and 28 certificate programs. In the fall of 2013, the University enrolled 7,422 students (about 4,600 of them undergraduates) and employed about 329 tenured or tenure-track faculty and 437 non-tenure-track faculty.

series, library faculty, research faculty, research scientists/scholars, post-doctoral scholars/fellows, truly visiting faculty, distinguished professors, professors in residence, and endowed chairs.

³ Both parties timely filed briefs.

⁴ References to the transcript will be designated as “(Tr. __).” References to Employer exhibits will be designated as “(ER __).” References to Union exhibits will be designated as “U __).”

⁵ A small undergraduate college that offers a combined high school and undergraduate program.

With the exception of the School of Law, which operates on a semester schedule, the University operates on a quarterly schedule. Classes began for the fall quarter on September 21, 2013, winter quarter began on January 6, 2014, and the spring quarter will end on June 9, 2014. Some limited classes are offered during the summer.

A. Religious Nature of the University

Seattle University was founded in 1891 under the “auspices” of the Catholic Society of Jesus and it is one of the 28 U.S. Jesuit Colleges and Universities. It is listed in the registry of U.S. Catholic universities maintained by the Catholic Church.

1. Stated Purpose

According to the University’s articles of incorporation, its purpose is “the instruction of students and graduate scholars in various branches of the arts and sciences and related subjects, and to confer degrees, diplomas, and certificates to such persons as shall in the judgment of the faculty merit the same.” The University’s mission statement, displayed prominently in a number of locations on its campus and website, asserts that “Seattle University is dedicated to educating the whole person, to professional formation, and to empowering leaders for a just and humane world.” Its vision statement, typically displayed alongside the mission statement, asserts that “We will be the premier independent university of the Northwest in academic quality, Jesuit Catholic inspiration, and service to society.” The University states in accreditation submissions that it “does not seek to instill a specific belief system, world view or statement of faith.”

The Petitioner introduced into the record the mission statements of the University of Washington, Washington State University, Central Washington University, and Western Washington University. These statements are similar to the Employer’s statement of purpose, but differ from the Employer’s vision statement in making no reference to Jesuit Catholic “inspiration.” Like the Employer’s, the University of Washington, Washington State University, and Central Washington University’s statements all prominently mention service.

2. Catholic Identity

The Society of Jesus was founded in 1540 by St. Ignatius Loyola, a priest and scholar, and granted Papal approval that year. From its inception the order was associated with scholarship and with institutions of higher learning; the Jesuits established 40 colleges within St. Ignatius’s lifetime and hundreds more in the following centuries.

The president of the University must be a Jesuit, as must all seven members of the Board of Members and seven members of the Board of Trustees (including the president; see below). Approximately 30 percent of the University’s student body is Catholic. It appears from the record that, although the University recruits heavily at Catholic high schools, it provides no financial support specifically for Catholic students. There is no evidence in the record that Catholics receive any preference in admission, and the president of the University, Father Stephen Sundborg, testified that there is no quota for Catholics at the school. Undergraduate students are required to take two theology courses, one of which must include a component on the Catholic tradition. Twenty-six Jesuits live on the Seattle University campus, 13 of them in apartments within the student dormitories.

The University offers daily Catholic masses on campus. However, neither students nor

faculty are required to attend these or any religious events. The University president begins all meetings of his cabinet, consisting of the University's vice presidents, provost, executive vice president and vice presidents, with a prayer. He begins the annual training for new full-time faculty with a speech on the school's Jesuit Catholic inspiration.

The brochure given to incoming students contains several references to faith and spirituality, but makes no mention of Christianity, Catholicism, or God. The home page of the school's website regularly features banners on Jesuit or Catholic events (such as Holy Week or the installation of Pope Francis as the first Jesuit pope), and the school's Jesuit Catholic identity is mentioned on the school's main admissions page (although the mention appears to be below the fold, that is, one would have to scroll down to see it). The school's seal, featured on its website and campus buildings, contains references to Jesuit origins and the initials "IHS." These initials typically appear on Catholic churches and, as a faculty witness explained, stand for "in hoc signo vinces," "in this sign you will conquer," a phrase that, according to legend, appeared from heaven to the Emperor Constantine in a battle in the year 8312 CE.⁶

Except through a voluntary survey of students as to their religious identification, the University does not investigate the religious beliefs of its students, faculty, or Trustees (although President Sundborg testified that 20 of the 30 current Trustees are in fact Catholic).⁷ The University's interview guidelines mandate that it is unacceptable to ask interviewees questions about religion or creed. There is no requirement of faculty that they be Christian or Catholic or hold or inculcate any Catholic doctrine. Sundborg testified that he asks every person who interviews with him for hire by the University how he or she will contribute to the Catholic Jesuit mission of the University. However, Sundborg interviews only candidates for dean, division head, and vice president and does not interview anyone in the petitioned-for unit. Finalists for tenure-track faculty positions are provided with material on the University's mission, vision, and values and asked to write an essay that responds to them.

The three non-tenure-track faculty who testified for the Union stated that during their interview processes there was no mention of the Catholic identity of the school (the non-tenure-track faculty member who testified for the Employer did not mention whether religion was mentioned during his hiring). One faculty witness, Lawrence Cushnie, stated that when he was hired the only moment that religion was discussed was when he asked the professor interviewing him if it was a problem that he was an atheist and was told no.

The faculty handbook, which the president testified constitutes a contract with faculty, makes no mention of God or Christianity. The single reference in the handbook to the school's Jesuit identity is in "Elements of Faculty Quality," under the subhead "General Considerations": because "the religious dimension of human life is fundamental to the identity of a Jesuit university ... [e]ach member of the faculty is expected to show respect for the religious dimension of human life."⁸ The president testified that students have on occasion come to him

⁶ The same witness who explained that background, Michael Ng, noted that Constantine embraced both Christianity and paganism and was not baptized as a Christian until after his death. Tr. 1066.

⁷ The bylaws of the University provide for 35 Trustees, but there are currently only 30. ER 2 p.6; Tr. 67.

⁸ Immediately following these "general considerations," are "essential considerations," which describe teaching excellence as the critical ingredient of quality for faculty and make no mention of God or adherence to any doctrine. ER 3, section 3.1(b).

to complain that their Catholicism was demeaned by professors and that he would on those occasions direct the faculty member's department chair to remind the faculty member of that passage in the handbook. The president also testified that he would respond in the same way if a student complained about being demeaned for being Jewish or Muslim or non-religious. The president was not aware of any faculty member ever being sanctioned for conduct not in harmony with Catholic teachings. According to the faculty who testified, adherence to Catholic or any religious doctrine plays no role in faculty evaluations. There is no mention of God, Christianity, Catholicism, or Jesuits on the student evaluations of faculty, which are the primary, and in many cases sole, method by which non-tenure-track faculty are evaluated. Except for identifying the school as a Jesuit Catholic university, there is no mention of God, Christianity, Catholicism, or Jesuits in the two full-time faculty job postings or the sample adjunct faculty posting included in the record. All three postings include non-discrimination statements providing that the University does not discriminate on the basis of religion.

Neither the Catholic Church nor the Society of Jesus has any authority over the internal workings of the University; the Catholic Church explicitly guarantees the University autonomy from the Church, and the University stated in its most recent accreditation submission that it operates independently of the Church and the Society of Jesus. However, the president of the University must be a Jesuit, and as such, his immediate supervisor in the Jesuit hierarchy is the Jesuit provincial for the region. By virtue of that hierarchy, the provincial could remove the president from his position (although there is no evidence in the record of a provincial ever doing so). In addition, the Seattle archdiocese could remove the University from the registry of U.S. Catholic universities.

It would appear from Employer exhibits that approximately 10 faculty members are Jesuits.⁹ The Society of Jesus periodically provides the University a roster of Jesuits who are trained as academics and available for hire as faculty; to be hired as faculty, such a Jesuit priest must go through a similar hiring process as any other candidate, and once hired, these priests receive the same salary as other faculty.

Provost Isiaah Crawford testified that, due to Catholic policy on abortions, nursing students are barred from receiving any training on or participating in abortions. The University has a policy barring the sale or dispensation of condoms on campus, although neither the student nor faculty handbook contains any prohibition of the presence or use of condoms on campus. The University Health Center, however, does prescribe and dispense other forms of birth control "for medical reasons."

3. University Governance

The University is organized as a non-profit corporation for education purposes and is granted federal tax exemption under § 501(c)(3) of the Internal Revenue Code. The University bylaws provide for a seven-person Board of Members, each of whom must be a Jesuit on contract with the University. However, the Members' authority is restricted to naming three Jesuits to the Board of Trustees, approving any changes to the bylaws or articles of incorporation, and approving the sale or lease of any property worth more than \$300,000. Otherwise, they have no say over running the University. That authority resides in the Board of Trustees, which may have up to 35 members, of whom seven must be Jesuits. The trustees in

⁹ See ER 9, p.4.

turn delegate the day-to-day administration of the University to the president, whom the Board of Trustees selects and who must be a Jesuit (and who serves ex officio as a trustee). Their selection of a candidate must receive final clearance from the head of the Jesuits for the region (called a provincial).

Reporting to the president, in turn, is a cabinet made up of an executive vice president, vice presidents, and the provost. The provost oversees the division of academic affairs and all deans report to him. The department chairs report to their respective deans and faculty to their department chairs.

4. Funding

University's annual budget is \$208 million, of which 95 percent comes from student tuition and fees, with a significant portion of that originating from federal and state government in the form of student aid. The remaining 5 percent comes from return on the University's endowment. Neither the Catholic Church nor the Society of Jesus provides any funding to the University.

B. Managerial Indicia of Faculty

Provost Crawford describes the University's organizational model as shared governance. The most important vehicle for faculty participation in University governance is the Academic Assembly. According to the assembly's bylaws, the assembly plays a "key leadership role in determining university policy" in the areas of "faculty welfare," curriculum, and student recruitment and enrollment, and "represents faculty interests" in strategic planning, budgets, technology, and physical facilities. Although the provost testified to the strong weight the Academic Assembly's recommendations carry with him, minutes of the assembly indicate that both programmatic and budgetary decisions are regularly made by deans or other administrators without the involvement of the assembly.

The assembly consists of 19 faculty representing, in proportion to their share of the total University faculty, each of the University's colleges and schools. The faculty from the colleges and schools elect the representatives, but there is no information in the record as to how or when that election occurs. The provost testified that two seats on the assembly are set aside for non-tenure-track faculty, but there is no such provision in the assembly bylaws. The provost also testified that part-time non-tenure-track faculty "do not hold seats on the academic assembly at this time;" nothing in the assembly bylaws specifies whether part-time faculty are eligible to serve on the assembly or vote for representatives to it. Although the assembly's bylaws state that "non-tenure-track faculty are encouraged to participate," none of the non-tenure-track faculty witnesses testified that they had been given an opportunity to vote for representatives or run for election to the assembly. The assembly bylaws specify that at least 50 percent of the representatives from each college or school must be tenured.

The assembly meets every two weeks during the academic year. To accommodate this work, members of the assembly receive release from teaching the equivalent of one course per year. Members are elected to three-year terms. The record does not make clear how these terms would be accommodated to faculty on single-year, quarterly, or semester-long contracts, nor whether non-tenure-track are eligible for course release, although one faculty witness testified that in his experience non-tenure-track faculty are not eligible. All adjuncts and most other non-tenure-track faculty are on single-year or shorter contracts. It appears that 20 or fewer members

of the petitioned-for unit are on multi-year contracts.¹⁰

The record indicates that proposals for programmatic change arise from departments, go through colleges and schools, and only then reach the Academic Assembly. Proposals then go to an assembly subcommittee, the Program Review Committee, on which, according to its membership rules, only tenured faculty can sit.¹¹ The Program Review Committee reports back to the assembly, and the assembly in turn reports to the provost. The provost has full veto power over the assembly's decisions, although he testified that in practice he rarely does reject the assembly's recommendations (but, as noted in the Union's brief, there was some discrepancy between his testimony on this point and the assembly minutes).

In addition to the Academic Assembly, there are 13 University-wide standing committees within academic affairs on which rank-and-file faculty serve. The University Rank and Tenure Committee is limited to tenured faculty. There are also an unknown number of college- or school-wide committees. Many committees, including all those within the College of Science and Engineering, are limited to tenure-track faculty, others to tenure-track and full-time non-tenure-track faculty. In any case, all committees for which evidence was provided have multi-year terms. As in the case of the Academic Assembly, the record does not make clear how faculty on single-year or shorter contracts would serve these terms. One contingent faculty witness testified that he serves on a business school committee, the MBA Marketing Committee, and the Employer provided a list of 273 non-tenure-track faculty who served on committees between 2010 and the date of the hearing; that list did not make clear which of the listed people are members of the petitioned-for unit. There is a non-tenure-track subcommittee of the Arts and Sciences faculty assembly, which discusses issues of concern to non-tenure-track faculty, such as office space and job security; the Employer's list of non-tenure-track faculty on committees shows four non-tenure-track faculty serving on this committee. There was no evidence as to what if any authority this subcommittee has.

Significant governance also occurs at the departmental level, by way of departmental meetings. The University's faculty handbook limits to tenured faculty departmental tenure-review committees, which initiate tenure recommendations and pass them to college- or school-level review committees and then to the University Rank and Tenure Committee. The handbook specifies that full-time faculty are expected to attend departmental meetings, but testimony shows that not all departments follow this policy. The College of Education's adjunct faculty handbook invites adjunct faculty to attend departmental and College-wide faculty meetings, but the other faculty handbooks that were entered into the record contain no such invitation. One contingent faculty witness, Lawrence Cushnie, testified that he was never invited to attend departmental meetings, but once he shifted from part-time to full-time he requested to attend and was allowed to attend those meetings at which no hiring decisions were made (with the result that he attended one meeting). Another contingent faculty witness, Jerome Veith, testified that his department chair told him that non-tenure-track faculty were not allowed to attend department meetings.

¹⁰ According to testimony by the provost, the exhibit listing contingent faculty with multi-year appointments includes both program directors and administrators who also do some teaching. Once program directors, administrators, and visiting professors are excluded, only a small number of contingent faculty have multi-year appointments (fewer than 20 outside of the School of Law). ER 44; Tr. 1194 & 1232-34. These appointments are typically for three years, but may be as long as five years. Tr. 1195; ER 35 & 44.

¹¹ U 31. However, the Employer lists a non-tenure-track faculty member as sitting on this committee. ER 32.

C. Community of Interest Factors Among Contingent Faculty

1. Supervision

All faculty fall within the academic affairs division of the University and report through a department chair to a dean and ultimately to the provost. All non-tenure-track faculty contracts are signed by the provost.

2. Skills and Duties

With the exception of library and research faculty (excluded from the petitioned-for unit), all faculty, including contingent faculty, are hired to teach University classes to enrolled students. All must have specialized expertise within their field and teach to the course and degree requirements within their discipline and are required to be available to students outside of class time. They are also required to commit themselves to the mission of the University. Full-time contingent faculty with the title of instructor are expected to provide some service to the University; none is expected to engage in research or scholarship (in fact, one contingent faculty member described being actively discouraged from it). The president testified that the expectation of service was modest in comparison to the level of service expected of tenure-track faculty and varied by department. Other evidence suggested that many departments have no expectation of service from their instructors; for example, instructor Cushnie testified that he provided no service to the University. Neither full-time contingent faculty with the title of lecturer nor part-time faculty are required to provide any service. While participation in University and departmental governance is a factor in consideration of tenure-track faculty for tenure, such participation has no role in the evaluation of non-tenure-track faculty.

The University divides its contingent faculty into two main categories: full-time and part-time or adjunct. Full-time faculty, defined as those teaching seven classes per year, are paid a yearly salary, while part-time faculty are paid per course (at a rate of pay significantly lower than that of full-timers). There is also a category of contingent faculty who are “modified full-time,” which is to say that they are working less than full-time but are paid a salary based on their full-time equivalent and are treated otherwise like full-time faculty.

New full-time contingent faculty are required to attend a two-day University-wide orientation along with new tenure-track faculty; new part-time faculty are required to attend shorter departmental or school-wide orientations.

Within the full-time category, contingent instructional faculty are further categorized as instructors, lecturers, clinical professors, professors of lawyering skills, or adjuncts. As the title suggests, professors of lawyering skills exist only in the law school, and the clinical professor category was apparently designed particularly for the College of Nursing, although clinical professors also exist elsewhere. The only distinction between the instructor and lecturer categories is an expectation that instructors provide service and advising in addition to teaching. Neither lecturers nor adjuncts are required to provide any service, advising, or scholarship. There is no requirement that any contingent faculty have terminal degrees in their fields. Two of the three contingent faculty witnesses for the Union do in fact have terminal degrees (PhDs), and the third expected to receive his PhD this summer.¹²

¹² There was no evidence on the educational background of Joseph Barnes, the faculty witness called by the Employer.

3. Wages and Benefits

Different schools and departments offer different rates of pay. Full-time contingent faculty with a terminal degree are paid a minimum of \$45,000, those without a terminal degree a minimum of \$42,000. Contingent faculty within some departments, such as business or nursing, are paid significantly higher than that. Part-time faculty are paid between \$3,200 and \$7,000 per course. Given that a full-time load is seven classes per year, these amounts translate to a significantly lower rate of pay for part-time faculty than for full-time. All non-tenure-track faculty are paid monthly.

Both full-time faculty and part-time faculty teaching at least half-time, defined as four classes in an academic year, are eligible for benefits, and the benefits for all faculty are identical.

4. Terms and Conditions

Contingent faculty are hired for periods from a single quarter or semester to several years (the upper limit appears to be five years). No contingent faculty have any right to employment beyond the terms of their contracts. As noted above, it appears that fewer than 20 members of the petitioned-for unit have multi-year appointments. No examples of contingent faculty contracts were put into the record.¹³ According to the president, all faculty are contractually bound by the faculty handbook (but there is no evidence in the record that all—or any—contingent faculty receive this handbook). Full-time and part-time non-tenure-track faculty are hired both to replace tenure-track faculty on leave and to satisfy enrollment demand without adding permanent positions.

All faculty teach regularly scheduled¹⁴ classes within the University's academic calendar on the University's main campus, its satellite campus in Bellevue, or the clinical laboratory at Swedish. All contingent faculty receive University email accounts and are assigned offices, many of them shared offices in the Rihanna Building. The three faculty witnesses for the Union reported sharing offices with other contingent faculty. All faculty receive access to the campus library, the campus fitness facility, and all other campus facilities. All determine their own grading standards and teaching methods and create their own syllabi.

As described by the contingent faculty witnesses, hiring of contingent faculty is fairly informal: The candidate typically contacts a faculty member within the relevant department and then interviews informally with the department chair or another faculty member.

All faculty receive evaluations from students, using the same form. Part-time faculty typically do not receive any evaluation from other faculty. Full-time faculty witnesses describe receiving informal evaluations from the department chair about once a year, either in the form of a brief email from their department chair or a self-evaluation signed off on by their

¹³ The record does include a sample "preliminary offer letter" for non-tenure-track faculty. ER 38. The letter seems to apply only to full-time faculty, as it mentions attendance of a required fall "seminar series" for all new faculty, and, as described above, testimony established that only full-time faculty attend the new faculty orientation.

¹⁴ I am unable to find any support in the record for the Employer's claim, in its brief, that contingent faculty have authority over their own course schedules.

department chair.

Full-time faculty are required to attend a new faculty orientation, but part-time faculty are not. Only one of the faculty witnesses mentioned attending any sort of orientation for part-time faculty.

Although officially full-time contingent faculty are eligible for faculty development funds, this varies by department and school and none of the contingent faculty witnesses testified to receiving any such funds.

5. Interchange

There is substantial evidence of contingent faculty moving from part-time to full-time and vice versa, as well as from receiving benefits to not receiving benefits and vice versa. Two of the four contingent faculty witnesses have shifted between part-time and full-time.

Due to the specialized nature of academia, faculty do not normally shift between departments, precluding interchange between departments. There was no evidence in the record as to whether members of the petitioned-for unit ever substitute for each other within departments in cases of illness or other brief absence and therefore no evidence of temporary interchange among members of the petitioned-for unit.

According to testimony from the provost, movement between full- and part-time status does not occur often and when it does occur it is more from part-time to full-time than the reverse. However, the contingent faculty witnesses testified that they were aware of people who had made transitions in both directions. Two faculty witnesses, Lawrence Cushnie and Joseph Barnes, had switched from part-time to full-time, and another, Michael Ng, had always been part-time but had switched from being ineligible for benefits to being eligible and back again. However, except for the law school's lawyering skills positions, there is no provision for promotion from non-tenure-track to tenure-track; as the term implies, the two are entirely separate tracks.

6. Functional Integration

Contingent faculty teach in every college and school within the University. It appears that they teach at all levels of courses within departments, because they both serve to fill out enrollment and to replace tenured faculty on leave.

7. Contact Among the Proposed Unit Members

Faculty witnesses testified to significant contact with other members of the petitioned-for unit. Large numbers of contingent faculty are assigned to shared offices in the Rihanna Building, sharing space there with faculty from other departments and with both full- and part-timers. There is a single shared lunchroom in this building, shared by all the contingent faculty assigned offices in the building.

D. Community of Interest with Nursing, Law, and Clinical Faculty

The law school is unique within the University in operating on a semester calendar, rather than a quarter calendar, and, even within its separate calendar, its classes operate on a different schedule from the rest of the University. Unlike any other part of the University, the law school offers a January term. The law school's budget operates separately from the rest of

the University; it pays the University 7 percent of its revenue, but fundraises and allocates its budget entirely independently. It has its own endowment.

The law school is subject to numerous requirements for accreditation by the American Bar Association. Law faculty, unlike other faculty, are required to grade on a curve.

The faculty handbook has an entire section of special provisions for the law school. The law school has a line of contingent faculty, professor of lawyering skills, that does not exist elsewhere in the University. Unlike all other contingent positions, these faculty have the option of shifting into a tenure track. Although most University classrooms are part of a University-wide system and can be assigned to any department, all instruction in the law school occurs in the two law school buildings and only law classes are taught there. Contingent faculty witnesses testified to having no contact with faculty in the law school.

While the College of Nursing operates on the main University calendar, nursing is unique in running an active summer session, with the result that nursing faculty, unlike other faculty, are sometimes required to teach in the summer. They also teach in clinical settings at all times of the day or night, including graveyard shift.

The provost testified that there is a shortage of nursing faculty and that the clinical professor track was designed to attract nurses who did not want to be required to engage in the research required for tenure. That testimony was confirmed by minutes of the Academic Assembly, where the problem was discussed. A significant fraction of nursing teaching occurs in the Clinical Performance Laboratory, located a few blocks away from the Seattle University campus, at Swedish Medical Center. Like the classrooms in the law school buildings and unlike most University classrooms, the Clinical Performance Laboratory instructional spaces are not used University-wide but are assigned exclusively for nursing teaching (although non-nursing instruction occurs in the College of Nursing's main on-campus building). Significant nursing instruction also occurs at healthcare institutions that partner with the University. Students in some other departments, including ministry and theology and education, also engage in clinical or applied learning at external sites.

For the College of Nursing to maintain its accreditation, it must have a student completion rate for each of its degree programs of at least 70 percent, a student pass rate of the nursing licensing exam of at least 80 percent, and a one-year post-graduation employment rate of at least 70 percent. The provost was unable to think of any other college or school in the University that is required to hit similar metrics for accreditation. In conjunction with these requirements, the College requires faculty to follow detailed procedures in cases where students are at risk of failing a course. These include separate procedures for clinical instruction.

The College of Nursing offers a faculty mentoring program unique within the University, with the aims of promoting faculty excellence and retention and developing a "distinctive identity" for this group of faculty. It also allows all faculty members at or above 50 percent of full-time to vote in the College of Nursing faculty assembly.

Nursing faculty are required at hire to provide numerous types of documentation that other faculty are not: licensure, immunizations, TB screening, CPR certification, blood borne

pathogen training, HIPAA compliance, and Washington State Patrol background clearance. The nursing faculty handbook strongly recommends that faculty purchase liability insurance. Faculty must update their TB screening, CPR certification, and blood borne pathogens documentation annually. Due to these “unique and strenuous” licensure requirements, the Program Review Committee has recommended that College of Nursing faculty be exempted from faculty appointments guidelines.

Faculty witnesses for the Union testified to having no contact with nursing faculty. However, contingent faculty member Joseph Barnes testified that he regularly sees nursing faculty in the business building, where he teaches and has an office.

The evidence in the record on the clinical professor category is limited. The Employer’s records lists only three people, two of whom are excluded from the unit as program directors, as having this title in the 2013–14 academic year.¹⁵ The sole remaining person teaches in nursing. The University’s document on academic titles describes clinical professors as “academically qualified individuals with specific skills and extensive experience in a given professional field” who “perform teaching-related duties in clinical, lab, studio, professional practice, or classroom settings.” None of the descriptions of the other faculty categories include any explanation of what qualifies them for their positions or designates the location of their teaching. These omissions imply that what qualifies other faculty is not “extensive experience in a given professional field,” but rather, by process of elimination, academic or scholarly credentials, and that their teaching is limited to the usual location—the classroom.

III. ANALYSIS

The Employer raises four issues: 1) the Employer is not subject to Board jurisdiction as a religious institution, 2) full-time members of the proposed unit are managers, 3) the unit is not appropriate because full-time and part-time contingent faculty do not share a community of interest, and 4) law, nursing, and clinical faculty should be included in the bargaining unit.

A. Board Jurisdiction Does Not Risk Church-State Entanglement.

The Employer contends that it is a religious institution and that the Board’s exercise of jurisdiction would violate the First Amendment to the United States Constitution.

1. The applicable legal standard

In *NLRB v. Catholic Bishop of Chicago*, the Supreme Court overturned the Board’s policy to “to decline jurisdiction over religiously sponsored organizations ‘only when they are completely religious, not just religiously associated.’” 440 U.S. at 492 (quoting *Roman Catholic Archdiocese of Baltimore*, 216 NLRB 249, 250 (1975)). Instead, the Court stated that the Act must be construed to exclude church-operated schools because to do otherwise “will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school’s religious mission.” *Catholic Bishop*, 440 U.S. at 502. The Board’s engagement in such inquiry would violate the First Amendment. *Id.* Although it invoked the doctrine of constitutional avoidance, the Court nevertheless posited that Board assertion of

¹⁵ These small numbers are somewhat in tension with testimony suggesting the importance of this category in nursing and law and existence in other departments. See Tr. 359–60.

jurisdiction over church-operated schools would “‘give rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid.’” *Id.* (quoting *Lemon v. Kurtzman*, 403 U.S. 602 (1971)). The “‘admitted and obvious fact [is] that the *raison d’être* of parochial schools is the propagation of a religious faith.’” *Id.* at 503 (quoting *Lemon*, 403 U.S. at 628, Douglas, J., concurring).

To assess whether, under *Catholic Bishop*, exercise of the Board’s jurisdiction presents a significant risk of infringing the First Amendment, the Board now applies a “substantial religious character” test on a case-by-case basis. *Trustees of St. Joseph’s College*, 282 NLRB 65, 68 (1986). The Board considers all relevant aspects of the school’s organization and function, including “the purpose of the employer’s operations, the role of unit employees in effectuating that purpose, and the potential effects if the Board exercised jurisdiction.” *Univ. of Great Falls*, 331 NLRB 1663, 1664–65 (2000). Important factors include the organization’s mission statement, whether and to what degree curriculum requirements emphasize the associated faith, requirements that faculty teach or endorse the faith’s doctrine, significant funding by the religious organization, governance by a religious organization or religious doctrine, and requirements for (or preference given to) administrators, faculty, or students who are members of the faith associated with the institution. *Id.* at 1664–65; *Ecclesiastical Maint. Services*, 325 NLRB 629 (1998).

In *St. Joseph’s*, the college was owned by the Sisters of Mercy, the Mother General of the Sisters of Mercy was the chair of the board of trustees, and all trustees and most of the administration of the college were Sisters. *St. Joseph’s*, 282 NLRB at 65. Faculty were required to promote the objectives, not only of the college, but of the order itself. *Id.* at 68. Faculty were prohibited from inculcating positions contrary to those of the Church, and the Bishop of Portland could fire them if their conduct was “not in harmony with Catholic beliefs.” *Id.* at 68. For these reasons, the Board declined to assert jurisdiction.

In contrast, in the case of a college affiliated with the African Methodist Episcopal (AME) Zion Church, the Board found no significant risk of church-state entanglement where the college’s stated mission was not religious, the church was not involved in the day-to-day administration of the college, faculty members were not required to conform to church doctrine or promote church teachings, and neither faculty nor students were required to engage in worship. *Livingstone College*, 286 NLRB 1308 (1987). Thus, although the church owned the college’s property, appointed one-half of the board of trustees, and provided \$845,000 of the college’s annual budget of just over \$5 million, the Board asserted jurisdiction. *Id.* at 1310. Compare *Nazareth Regional High School*, 283 NLRB 763, 765 (1987) (declining jurisdiction over a school, noting applicants for teaching positions were asked if they were willing to teach and impart Catholic doctrine in all classes); *Jewish Day School of Greater Washington, Inc.*, 283 NLRB 757 (1987) (declining jurisdiction where entire board of governors was Jewish and required to be “active in community affairs, including the United Jewish Appeal and the Board of Jewish Education”).

As noted by the Employer, the D.C. Circuit has repeatedly refused to enforce Board decisions asserting jurisdiction based on the “substantial religious character” standard and instead has adopted its own three-part test. See *Univ. of Great Falls*, 278 F.3d at 1343; *Carroll College, Inc.*, 588 F.3d 568. However, the Board has not adopted the D.C. Circuit’s test and therefore it does not govern my decision here.

2. Employer lacks substantial religious character

The University receives no funding from the Catholic Church or the Society of Jesus and is explicitly independent of those organizations. Although its president and entire Board of Members must be Jesuits, only a minority of its Board of Trustees must be Jesuit, and there are no requirements that any other Trustees be Catholic. Neither the organization's purpose nor mission statement mentions the Society of Jesus, Catholicism, or Christianity, and its vision statement specifies its independence and its "Jesuit Catholic inspiration." Only a minority of the student body is Catholic, and undergraduate students are required to take only one class that includes as a component instruction in Catholic theology. The provincial of the Jesuits has indirect power over the governance of the University through his power to remove the president, but there is no record of a provincial ever doing so; as theoretical and indirect as this power is over University policy in general, it is even more attenuated in the case of members of the petitioned-for faculty unit, whose hiring and retention does not involve the president.

Most significantly, faculty are subject to no religious requirements. *Livingstone College*, 286 NLRB at 1309–10 (noting absence of requirements that faculty conform or belong to a particular religion diminishes any risk of church-state entanglement posed by Board jurisdiction). There is no provision in the University's policies for disciplining or firing faculty if they do not adhere to Catholic or Jesuit values. A contingent faculty member's religious values, or lack thereof, play no role in their hiring or retention at the University and are not a subject of their evaluations or suitability for promotion. While the Society of Jesus provides the University with a list of Jesuits available to serve as faculty, none of these faculty are members of the petitioned-for unit.

For these reasons, I find no significant risk of constitutional infringement from exercise of jurisdiction under the Act and I therefore find that assertion of jurisdiction under the Act is proper.

B. No Members of the Proposed Unit Are Managers

The Supreme Court has held that faculty members who effectively determined curriculum, grading systems, admissions, tuition, matriculation standards, academic calendars, and course schedules through faculty-wide meetings and faculty committees are managers excluded from the Act's coverage. *Yeshiva*, 444 U.S. at 682. The Court cautioned that not all professors are managers, and professors may not be excluded from a bargaining unit merely because "they determine the content of their own courses, evaluate their own students, and supervise their own research...." *Id.* It suggested that in some contexts "a rational line could be drawn between tenured and untenured faculty members..." *Id.* at 690 n.31.

In *Yeshiva*, the faculty had extensive authority over curriculum, academic calendars, course schedules, grading policies, teaching methods, admission and matriculation standards, and admissions, retention, and graduation of individual students. *Id.* at 686. The faculty also sometimes set tuition and enrollment levels and made budget requests that were followed. *Id.* The court found that the faculty therefore determined "the product to be produced, the terms upon which it will offered, and the customers who will be served." *Id.*

In applying *Yeshiva*, the Board emphasizes the effective control faculty have over

academic, as opposed to non-academic, matters. *Lewis & Clark College*, 300 NLRB 155, 161 (1990). The Board evaluates how academic policy decisions are made, whether through departmental consensus, through committees, or by committees of the whole. *Id.* It also looks not only at whether the proposed unit members are represented on committees, but whether they make up a majority or minority of the committees and whether curricular proposals had to be approved by administration. *Univ. of Great Falls*, 325 NLRB at 95, *aff'd*, 331 NLRB 1663 (2000), *refused to enforce on other grounds*, 278 F.3d 1335 (D.C. Cir. 2002). The Board looks not just to the authority of faculty on paper, but their actual authority in practice. *Cooper Union for the Advancement of Science & Art*, 273 NLRB 1768 (1985) (finding faculty non-managerial where, although they officially had extensive authority over administrative and academic matters, in practice their authority was limited); *Bradford College*, 261 NLRB 565 (1982) (same). The Board places the burden of production of evidence of managerial status on the party asserting it. *Montefiore Hosp. & Medical Center*, 261 NLRB 569, 572 n.17 (1982).

Here, contingent faculty can determine the content of their courses, evaluate their students, and supervise their own research. According to the Court, none of that makes them managers. *Yeshiva*, 444 U.S. at 682. According to the testimony of the provost, the Academic Assembly has some of the power found managerial in *Yeshiva*—authority over curriculum, grading policies, and matriculation standards. However, because the assembly bylaws require that tenured faculty make up a majority of the representatives from each school, contingent faculty cannot ever make up more than a minority of the assembly; currently only 2 of the 19 members are contingent faculty. Furthermore, no contingent faculty can serve on the Program Review Committee,¹⁶ through which all proposals for curricular change pass before going to the provost, or on the Rank and Tenure Committee. The Employer provided evidence of full-time contingent faculty serving on committees, but did not provide any evidence as to what fraction of any committee is made up of contingent faculty.

While tenure-eligible faculty have a stake in participation in University governance, because it plays a role in their evaluation for tenure, contingent faculty have no such incentive. Furthermore, the year-to-year contracts of most contingent faculty pose a hurdle to serving three-year terms on committees, and any contingent faculty who served on these committees would likely be in the minority. In any case, the assembly has no say over tuition or student body size, factors considered crucial by the Court in *Yeshiva*. 444 U.S. at 686. Finally, as in *Great Falls*, all decisions of the Academic Assembly must be approved by administration (the provost).

Although the Employer in its brief cites numerous cases in which the Board found full-time faculty to be managers, none of those cases involved full-time *contingent* faculty. I am unaware of any case, and the Employer has not cited any, in which the Board found that contingent faculty, as distinct from tenure-track faculty, were managers. In what may be a sign of earlier, less stratified times,¹⁷ none of the cases cited by the Employer addressed the distinction between tenure-track and contingent faculty or how the distinction might bear on

¹⁶ As noted above, apparently one non-tenure-track faculty has in fact served on this committee.

¹⁷ As the Employer notes in its brief, non-tenure-track faculty make up a growing share of faculty at U.S. universities and colleges, including Seattle University. However, the Employer's claim that this weighs in favor of finding Seattle University's full-time contingent faculty to be managers is a *non sequitur*.

managerial status. Each involved a petition for a unit of all faculty or all full-time faculty, regardless of tenure eligibility. It is true in a limited sense that, as the Employer asserts in its brief, “[t]he Supreme Court’s test in *Yeshiva* is based on the faculty’s right as a whole to vote on and decide academic matters”—but only insofar as, in that case and the other cases the Employer cites, the petitioned-for unit was faculty as a whole. That is not the case here.

As noted above, the burden is on the party asserting managerial status to produce evidence to support it. That burden has not been met here as to full-time contingent faculty or any other members of the proposed unit.

For the reasons given above, I find that none of the members of the petitioned-for unit should be excluded as managers.

C. The Proposed Unit Is Appropriate

Section 9(b) of the Act directs the Board to make appropriate unit determinations to “assure to employees the fullest freedom in exercising their rights guaranteed by this Act.” 29 U.S.C. § 159. A bargaining unit based on arbitrary groupings of employees is inappropriate. *Moore Business Forms, Inc.*, 204 NLRB 552 (1973). Conversely, that a bargaining unit is based on a clearly identifiable grouping suggests it is appropriate. *In re Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011).

To determine whether a unit is appropriate, the Board focuses on whether the employees share a community of interest. *Specialty Healthcare*, 357 NLRB No. 83, slip op. at 9. Factors relevant to community of interest include similarity of skills, duties, working conditions, wages, and benefits, and common or separate supervision, interchange and contact with other employees in the unit, and functional integration in the Employer’s operations. *Id.* The petitioner’s desire is always relevant. *Id.* at 8. The unit need only be *an* appropriate unit, not *the most* appropriate unit. *See, e.g., Int’l Bedding Co.*, 356 NLRB No. 168 (2011).

In examining units of university faculty, the Board has found units of contingent faculty to be appropriate. For example, the Board found the part-time faculty at a small, urban, private university to share sufficient community of interest to constitute a bargaining unit. *Univ. of San Francisco*, 265 NLRB 1221 (1982). These faculty were spread across numerous colleges. *Id.* at 1221–22. All reported up through layers of administration to one dean and all had the freedom to set their own curriculum and teaching methods within a given course description. *Id.*

In another faculty unit case, the Board found that non-tenure-eligible faculty at a university’s New York City campus shared a community of interest. *Parsons School of Design*, 268 NLRB 1011 (1984). The Board based this finding on their being hired on the basis of special expertise and pursuant to identical employment contracts, being paid a common method of compensation, and all teaching regularly scheduled classes.¹⁸ In another faculty case, the

¹⁸ In that case, the Regional Director found that a unit of full-time and part-time non-tenure-eligible faculty shared a community of interest because both groups shared offices, had common departmental and overall supervision, received similar employment contracts, participated equally in non-teaching duties, and were ineligible for tenure. *Parsons*, 268 NLRB at 1011–12. However, by the time the case reached the Board the union had amended its petition to include only part-time faculty and the Board therefore did not reach the question of whether the non-tenure-eligible full-time and part-time faculty shared a community of interest. *Id.* at 1012.

Board found a unit of undergraduate faculty appropriate, but excluded graduate faculty, who had no interchange with other faculty. *Goddard College*, 216 NLRB 457 (1975).

The Board has found that tenure-eligible full-time faculty and non-tenure-eligible part-time faculty may not share a community of interest. *See New York Univ.*, 205 NLRB 4 (1973). In the cases where the Board has considered the appropriateness of combined full-time and part-time faculty units, that line has usually coincided with the line between tenure-eligible and non-tenure-eligible faculty.¹⁹ In the NYU case, tracking the suggestion in *Yeshiva*, the Board considered the “critical” dividing line to be eligibility for tenure. *Id.* at 7. The Board has never held that full-time and part-time faculty cannot be placed in the same unit solely by virtue of their status as full-time or part-time, and, conversely, since deciding the NYU case it has ordered elections for units combining part-time and full-time faculty. *Carroll College*, 345 NLRB 254 (2005); *Stephens College*, 240 NLRB 166 (1979).

Below, I analyze how each of the community of interest factors weighs here.

1. Supervision

All the contingent faculty report through the Academic Affairs line to the provost. Immediate supervision differs from department to department and areas within departments. However, this is a feature of the industry involved and does not correspond to job title or to the Employer’s four categories of contingent faculty. Every contingent faculty member is immediately supervised by the department or area chair in the discipline, which is to say that all contingent faculty share the same form of supervision. Therefore I find that supervision weighs in favor of community of interest.

2. Skills and duties

All contingent faculty in the petitioned-for unit teach. While not all contingent faculty are required to have terminal degrees, all must have expertise in an academic subject and assess their students at the end of the term. All are required to be available to their students outside of class. Some contingent faculty are required to provide a modest level of “service” to the University in addition to teaching. Thus, there is a great deal of similarity in skills and duties among the proposed unit. This factor weighs in favor of community of interest.

3. Wages and benefits

Wages vary between disciplines, but all are set relative to market demand in the discipline. Full-time non-tenure-track faculty are paid a salary, while part-time faculty are paid per course. However, some contingent faculty are classified as “modified full-time,” meaning

¹⁹ *Goddard College*, 216 NLRB 457 (1975); *Bradford College*, 261 NLRB 565 (1982); *Point Park College*, 209 NLRB 1064 (1974); *Farleigh Dickinson University*, 205 NLRB 673 (1973); *Catholic University of America*, 205 NLRB 130 (1973); *New York University*, 205 NLRB 4 (1973). In the three cases decided on the heels of the NYU decision, *Point Park*, *Farleigh Dickinson*, and *Catholic University*, the Board summarily and without further explanation excluded part-timers “for the reasons given in our decision in *New York University*.” *Point Park*, 209 NLRB at 1064; *Farleigh Dickinson*, 205 NLRB at 675; *Catholic University*, 205 NLRB at 130. In all but one case where the Board refused to order an election for a combined part-time and full-time faculty unit, the petitioned-for unit combined tenure-eligible and non-tenure-eligible faculty. The one exception was decided on healthcare-industry-specific grounds not applicable here. *NYU Medical Center*, 217 NLRB 522 (1975).

they are paid a salary and categorized as “full-time non-tenure-track,” but work something short of full time. All faculty who receive benefits receive the same benefits. Notably, both full-time and some part-time faculty receive benefits, providing a shared interest across these categories. From year to year, faculty members move in and out of eligibility for benefits. I therefore find this factor to weigh in favor of community of interest.

4. Terms and conditions

All faculty teach regularly scheduled classes. Except for those who teach entirely off-campus (such as in healthcare clinical settings or at the Employer’s satellite facility in Bellevue), all teach on the Employer’s Seattle campus. All teach courses within the academic calendar. None is eligible for tenure. None is required to have a terminal degree. All sign contracts that entitle them to employment for periods varying from one quarter to five years. All are officially subject to the faculty handbook.

The Employer contends specifically that the full-time contingent faculty do not share a community of interest with the rest of the proposed unit, citing *New York Univ.*, 205 NLRB 4. However, in that case the full-time faculty were all tenure-eligible and the part-time faculty ineligible. The Board considered eligibility for tenure to be the critical dividing line. *Id.* at 7. Here, full-time faculty included in the proposed unit are ineligible for tenure, as are the rest of the contingent faculty. For this reason, *New York Univ.* is inapposite. Additionally, in *New York Univ.*, only the full-time faculty received benefits, and they were expected to engage in research or publication, counsel students, and participate in University and departmental affairs. Here, none of the contingent faculty is expected to engage in research or publication, and the level of service expected of full-time faculty is “modest,” according to the University’s president. Many university governance opportunities are closed to most non-tenure-track faculty. As noted above, here, some part-time faculty are eligible for benefits.

Although there is variation in working conditions among contingent faculty, no clear line can be drawn around any particular set of contingent faculty according to a distinction in working conditions or terms of employment. There is also considerable commonality in working conditions for all contingent faculty. Therefore, I find that this factor weighs in favor of community of interest.

5. Interchange

It is in the nature of academia that faculty do not typically move from discipline to discipline, although they do move between areas within their discipline. As noted above, faculty may move from part-time to full-time and vice versa. Conceivably, a faculty member teaching part-time and classified as an adjunct could be shifted to “modified full-time” without any change in teaching responsibilities.

Much as a factory employer might shift shipping employees to different production lines as needed, the University shifts its contingent faculty to different classes and different teaching loads as enrollment demands. Thus, there is sufficient interchange among the types of contingent faculty to weigh in favor of finding community of interest.

6. Functional integration

Contingent faculty teach in every college, school, and department of the University. They make up a majority of the faculty in some departments. Contingent faculty teach introductory courses, without which tenured faculty would have no eligible students for advanced classes. Without contingent faculty covering courses, students could not meet graduation requirements. However, due to the independence of university teaching, integration is not a major factor here. I find this factor to be neutral.

7. Contact between proposed unit members

Faculty witnesses testified to significant contact with other contingent faculty, both full- and part-time. They share offices, many of them heavily grouped in a single building with a shared break room. I find this factor weighs in favor of community of interest.

8. Summary

In sum, these employees share similar skills, duties, working conditions, and form of supervision, and there is interchange among the categories of full-time, modified full-time, and part-time contingent faculty, and between those with and without benefits. There is both variation and commonality in their wages and benefits and much of the variation cuts across groupings of employees, including across the distinction between full-time and part-time. The Board does not require that a unit be the most appropriate unit, only an appropriate one. For the foregoing reasons, I find that the proposed unit members share sufficient community of interest to constitute an appropriate unit.

D. Nursing, Law, and Clinical Faculty Do Not Share an Overwhelming Community of Interest with the Petitioned-For Unit

To successfully challenge an otherwise appropriate unit because of an excluded classification, an employer bears the burden of demonstrating “that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit,” that is, “that there is no legitimate basis upon which to exclude certain employees from it.” *Specialty Healthcare*, 357 NLRB No. 83, slip op. at 16 (quoting *Blue Man Vegas LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008)). The Board has repeatedly certified separate elections for law school faculty members. *Univ. of Miami*, 213 NLRB 634 (1974); *Syracuse Univ.*, 204 NLRB 641 (1973); *Catholic Univ. of America*, 201 NLRB 929 (1973); *Fordham Univ.*, 193 NLRB 134 (1973).

In a case applying *Specialty Healthcare*, the Board found that an excluded category of employees did share an overwhelming community of interest with the petitioned-for unit employees, where the exclusion did not correspond to any administrative grouping of the employer and the petitioned-for employees and the excluded employees shared immediate supervision. *Odwalla*, 357 NLRB No.132 (2011). Although the petition distinguished employees according to work location, that was not a meaningful distinction, as all the employees worked in various locations. *Id.* at 27. Therefore, the Board ruled that the unit had to be expanded. *Id.*

Here, to begin with the obvious, the School of Law and College of Nursing are clearly identifiable as distinct divisions within the University, and therefore their faculty form rational, easily identifiable groupings that correspond to the Employer’s administrative groupings.

The law school operates on an entirely different academic calendar and employs faculty with job classifications not used elsewhere in the University. Unlike any other part of the University, the law school offers a January term. Unlike any other faculty at the University, certain non-tenure-track law school faculty are eligible to shift to tenure-track positions. Law classes are taught solely in the law school building or the law school annex; no other departments teach in those buildings. Contingent faculty witnesses, who are all from outside the law school, reported that while they have significant contact with contingent faculty from other departments, they have no contact with law school faculty. For these reasons, the Employer has not met its burden of demonstrating that there is no legitimate basis to exclude the law school faculty from the unit.

Unlike the law school, the College of Nursing operates on the same calendar as the rest of the University. Clinical instruction is a particularly significant portion of the program at the College of Nursing, but occurs in other disciplines, such as ministry and education. The clinical professor classification seems to have been largely designed as a tool to recruit nurses, but is not limited to nursing.

However, the College of Nursing is unique in making an off-campus clinical facility, the Clinical Performance Laboratory, central to its program. Nursing faculty are subject to numerous licensing and documentation requirements at hire to which no other faculty are subject. Nursing faculty, unlike other faculty, may be required to work over the summer and teach in clinical settings at all hours of the day and night.

There were no witnesses from the College of Nursing. Most of the faculty witnesses testified to having no contact with nursing faculty; one witness did state he saw nursing faculty regularly, but no witness described significant contact with nursing faculty.

Although there is some evidence of overlap in conditions between the nursing school faculty and that of the rest of the University, there are also many significant differences. The Employer has not met its burden of showing that “there is no legitimate basis upon which to exclude” the nursing faculty from the unit.

The Employer in its brief also contends that there is no basis for excluding the clinical professor faculty. It did not raise this issue at hearing, and consequently the Union did not address it in its brief. Nor is there a large amount of evidence in the record about these faculty. The job descriptions in the record suggest that, whereas most faculty qualify for their positions by virtue of academic credentials, clinical faculty do so through professional experience and that unlike other faculty they teach largely outside of the traditional classroom. The provost testified that the clinical professor category was at least in part created to help attract and retain nurses in a context in which there is fierce competition for nursing faculty.²⁰

All of the above, although sketchy, suggests that clinical faculty differ in a number of ways from other contingent faculty. Therefore, the Employer has not met its burden of showing there is no rational basis for excluding these faculty from the unit.

²⁰ Somewhat in tension with this testimony is the list of current contingent faculty, which shows only three people with “clinical” in their title, only one of whom is from nursing. There may be some error or omission in the record. However, my decision on this point does not depend on the numbers involved.

Therefore my inquiry ends. The petitioned-for unit that excludes nursing, law, and clinical faculty is appropriate.

E. Voter Eligibility Formula

The Employer contends that eligibility should be restricted to those on the active payroll during the pay period prior to the issuance of decision and who have taught in one of the two preceding academic quarters. Without factoring in nursing, law, or clinical faculty (who the Employer contends should be added to the unit), approximately 356 employees would be eligible to vote under the Employer's formula. In its post-hearing brief, the Petitioner acceded to the Employer's proposed formula.

The Board has long recognized that certain industries, or types of employment, require the generation of special rules governing voter eligibility. A balance is struck between the requirement of an ongoing connection with an extant bargaining unit and concern over disenfranchising those who, notwithstanding sporadic employment opportunities within a specific industry, have a continued interest in representation. *See Trump Taj Mahal Casino*, 306 NLRB 294 (1992) (reiterating Board's obligation to be "... flexible in carrying out [our] responsibility to devise formulas ... to afford employees with a continuing interest in employment the optimum opportunity for meaningful representation.")

Here, the proposed formula, which is based on an academic calendar year, is appropriate to the university setting at issue. Because the proposed formula ensures that all voters are employed by the Employer at the time of the election and have taught in an additional preceding quarter, I find that this formula strikes a reasonable balance between maximum enfranchisement and assuring all voters have an ongoing connection to the bargaining unit. I see no reason not to give effect to the wishes of both parties in this instance.

IV. CONCLUSION

Based on the foregoing and the entire record herein, I shall direct an election in the following appropriate unit (Unit):

All non-tenure-eligible faculty employed by the Employer, including but not limited to all non-tenure-track instructors, senior instructors, adjunct faculty, senior adjuncts, lecturers, senior lecturers, legacy titles including but not limited to visiting professors, visiting assistant professors, and core lecturers; and excluding all faculty teaching in the College of Nursing, all faculty teaching in the School of Law, all other employees, professors emeritus, tenure-track and tenured faculty, administrative faculty, full-time staff who are not compensated additionally for teaching, administrators, department administrators, program coordinators, program directors, directors, clinical professor series, library faculty, research faculty, research scientists/scholars, post-doctoral scholars/fellows, truly visiting faculty, distinguished professors, professors in residence, endowed chairs, campus clergy, deans, associate deans, department chairs, campus safety personnel, lab assistants, graduate assistants, teaching assistants, managers, guards, and supervisors as defined in the Act.

There are approximately 356 employees in this Unit.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by SEIU, Local 925. The election shall be conducted at a date, time and place to be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were on the active payroll during the pay period immediately preceding the issuance of this decision and who taught in either the fall 2013 or winter 2014 quarter. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **April 24, 2014**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic

filing through the Agency's website, www.nlr.gov,²¹ by mail, or by facsimile transmission at 312-886-1341. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

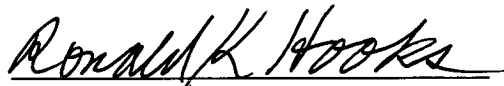
According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by **May 1, 2014**.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlr.gov. On the home page of the website, select the E-Gov tab and click on E-Filing. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

DATED at Seattle, Washington, this 17th day of April 2014.



Ronald K. Hooks, Regional Director
National Labor Relations Board
Region 19
2948 Jackson Federal Building
915 2nd Avenue
Seattle, Washington 98174

²¹ To file the eligibility list electronically, go to www.nlr.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu, and follow the detailed instructions.